Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-968

JOHN VICTOR ROEDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHAEL LERNER
Of the firm of
BARNETT & LERNER
705 North 8th Street
Kansas City, Kansas 66101
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, John Victor Roeder, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 7, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit was entered on November 7, 1975. A timely Petition for Rehearing was filed therein and was denied on November 26, 1975. A timely Motion for Stay of Mandate was filed therein and was granted on December 9, 1975. This petition for certiorari is filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is the transportation of a female performer in interstate commerce for participation in the production of a sexually explicit motion picture as a performer or entertainer a violation of the Mann Act, 18 U.S.C. Section 2421?

2. Is the use of the Mann Act by the Federal Government to regulate sexually explicit performances in the production of motion pictures unconstitutional as an unconscionable and unconstitutional restraint on individual freedom of expression as guaranteed by the First Amendment?

3. Is such use of the Mann Act by the Federal Government an unconstitutional impingement on the right of the states individually to regulate conduct and expression under the police powers reserved to them under the Tenth Amendment?

4. Is such use of the Mann Act by the Federal Government an unconstitutional attempt to indirectly regulate obscenity and pornography on a national basis, in contravention of the law and the Tenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Tenth Amendment to the United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 2421

Whoever knowingly transports in interstate commerce, or in the District of Columbia or in any territory or possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice * * *

Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The petitioner, John Victor Roeder, was convicted on a one-count indictment after trial by jury on July 23 through July 24, 1974, before the Honorable Frank G. Theis in the United States District Court for the District of Kansas. The indictment charged a violation of 18 U.S.C. § 2421, in that defendant transported in interstate or foreign commerce from Kansas City, Missouri to Overland Park, Kansas a female for the purpose of prostitution, debauchery or other immoral purposes.

The facts of the case are, with one exception, undisputed. In substance, it stipulated that:

On December 1, 1970, petitioner telephoned one Bobbie Lynn Eicholz to advise her of arrangements to make a pornographic movie the following Sunday. On December 6, 1970, petitioner drove Eicholz from Missouri to Overland Park, Kansas.

During the trip from Missouri to Kansas, petitioner told Eicholz that when they arrived in Kansas they would make a movie in which petitioner and Eicholz would engage in various sexual acts and that she would be paid. After their arrival in Kansas they did engage in the mentioned acts, all of which were filmed. Upon concluding the filming appellant returned Eicholz to her home in Missouri and paid her a sum of money in compensation for her activities. Eicholz received none of the proceeds from the film's subsequent sale.

Petitioner admitted the production of the film and his performance therein but denied transporting Eicholz from Missouri to Kansas, stating that he had picked her

up at her mother's home in Kansas. This testimony was refuted by Eicholz' mother.

In its instructions to the jury the Court charged that the term "other immoral purposes" contained in the indictment had no broader meaning than the term "prostitution".

On July 24, 1974, the jury returned a verdict of guilty. Judgment of conviction and commitment followed on October 4, 1974 for a violation of the Mann Act, 18 U.S.C. 2421, as charged in the indictment and petitioner was sentenced.

Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the conviction finding that, although the case was a variation from the accepted types of violation, it did not follow that the case escaped the thrust of the statute. The Court rejected petitioner's contention that a single transaction does not suffice to support a violation of the statute and found that the term "prostitution", as used in the Act meant only "the offering of the body to indiscriminate lewdness for hire or as sexual relations for hire". The Court further found that petitioner's conduct violated the statute because the sexual acts were an integral part, a cause, of the trip.

The Court of Appeals summarily rejected petitioner's argument that since petitioner's conduct involved the making of a film, a form of expression protected by the First Amendment, such conduct was placed beyond the reach of the Mann Act.

The Court of Appeals did not address itself to petitioner's argument that the federal government's use of the Mann Act to regulate sexually explicit performances

in motion pictures is unconstitutional as an impingement upon the right of the states severally to regulate conduct and expression under the police powers reserved to them under the Tenth Amendment, nor did it comment upon petitioner's further argument that such use of the statute was an unconstitutional attempt to indirectly regulate obscenity and pornography on a national basis.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of Federal law which should be settled by this Court.

The Court of Appeals, by its affirmance of petitioner's conviction, extended the ambit of the Mann Act to include conduct that the Act was never intended to cover.

The framers of the Act clearly and specifically established by the wording that the Act was not directed at immorality in general but was directed specifically at the problems of prostitution, traffic in women for purposes of prostitution and like offenses. Moreover, the Act was clearly not intended to cover every type of sexual immorality or activity, but was essentially and primarily directed at prostitution and vices or offenses stemming from prostitution.

This Court in *Caminetti* v. *United States* (1917), 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 stated:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the law is framed, and, if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the Courts is to enforce it according to its terms." (Citations omitted) . . .
>
> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. (Citations omitted) There is no ambiguity in the terms of this act . . . Statu-

tory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." 61 L.Ed. at 452, 453.

Speaking for the Court, Mr. Justice Day then adopted the definition of prostitution established in the earlier case of *United States* v. *Bitty* (1908), 208 U.S. 393, 52 L.Ed. 543, 28 S.Ct. 396:

"It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men." 61 L.Ed. at 453.

Mr. Justice Day, in *Caminetti,* supra, quoted *United States* v. *Bitty,* supra, concerning the phrase "or for any other immoral purpose":

"Now the addition in the last statute of the words 'or for any other immoral purpose' after the word 'prostitution' must have been made for some practical object.

. . . It may be admitted that, in accordance with the familiar rule of ejusdem generis the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute." (Citations omitted). 61 L.Ed. at 453.

In *Athanasaw & Sampson* v. *United States* (1913), 227 U.S. 326, 33 S.Ct. 285, 57 L.Ed. 528, Ann. Cas. 1913E, 911, this Court approved lower court instructions in a case involving the White Slave Act, to the effect that the term "debauchery" carried with it "the idea of a life which will lead eventually or tend to lead, to sexual immorality." 33 S.Ct. at 287.

The Mann Act was never intended to regulate performance in or production of sexually explicit or other motion pictures. Sexually explicit motion pictures fall under the classification of obscenity and not under the classification of prostitution. Obscenity is not synonymous with prostitution nor is prostitution synonymous with sexual intercourse. This Court has made it clear that motion pictures and theatrical productions are forms of expression entitled to prima facie First Amendment protection. *Burstyn* v. *Wilson* (1952), 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *California* v. *LaRue* (1972), 409 U.S. 109, 34 L.Ed.2d 342, 93 S.Ct. 390, rehearing denied, 410 U.S. 948, 35 L.Ed.2d 615, 93 S.Ct. 1351. To hold that the federal government may regulate sexually explicit performances in the guise of regulating prostitution would be equivalent to holding that while the federal government may not directly regulate sexually explicit motion pictures, they may be indirectly regulated through the use of the Mann Act. Since the performance of actors and actresses is an integral part of the production of a film such a holding is tantamount to a holding that films can be regulated by regulating their intrinsic components.

This Court has also held in *Miller* v. *California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, and allied cases (citations omitted) that supervision of motion pictures and other media is a right reserved to the several states under the Constitution of the United States. This Court has itself refused to impose such supervision on a federal or national level. Whether a motion picture is disqualified from the First Amendment's protective cloak is a question for determination by the appropriate state court or agency. In *Miller* v. *California,* supra, and in *Paris Adult Theater I* v. *Slayton* (1973), 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628, this Court stated that it did not intend to tell the states

what they must do, but rather to define the area in which the states could chart their own courses in dealing with obscene material. To require a state to structure obscenity proceedings around a national community standard is not only an exercise in futility but an unconstitutional infringement on such state's reserved powers under the Tenth Amendment.

2. The case is one of first impression.

Previous to the decision of the Tenth Circuit Court of Appeals in the present case no federal court had held that interstate transportation of a woman for purposes of making a sexually explicit film constituted a violation of the Mann Act. By its decision the Circuit Court has, in essence, ruled that the production of a sexually explicit film is *per se* an immoral practice and, if coupled with interstate transportation, a violation of the Mann Act.

CONCLUSION

Petitioner respectfully submits that this proceeding involves important questions of federal law and that the case is one of first impression, for which reasons the case should be settled by this Court, and that the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

MICHAEL LERNER
Of the firm of
BARNETT & LERNER
705 North 8th Street
Kansas City, Kansas 66101
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1853

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN VICTOR ROEDER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas

(Filed November 7, 1975)

Monti L. Belot, Assistant United States Attorney (Robert J. Roth, United States Attorney, on the brief), for Plaintiff-Appellee.

Michael Lerner of Barnett & Lerner (Barbara M. Vache of Barnett & Lerner, on the brief), for Defendant-Appellant.

Before HILL, SETH and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The issue which we are asked to consider in this case—an appeal from a criminal conviction—is whether the trans-

portation by defendant of a female across state lines for the purpose of participating in various sexual acts with him for hire and for the purpose of producing a movie depicting these acts constitutes a violation of the Mann Act.

The indictment charges that "on or about the 6th day of December, 1970, the defendant did unlawfully, willfully and knowingly transport in interstate commerce from Kansas City, Missouri, to Overland Park, Kansas, a woman * * * for the purpose of prostitution, debachery (debauchery) or other immoral purposes, in violation of 18 U.S.C. § 2421."[1]

The facts in the case, with one exception, are undisputed. It is stipulated (in substance) as follows:

On December 1, 1970, appellant telephoned Bobbie Lynn Eicholz, the girl in the drama, to advise her of arrangements to make a pornographic movie the following Sunday.

On December 6, 1970, appellant drove Bobbie Lynn Eicholz from Missouri to Overland Park, Kansas, to the Hoge Funeral Home, and photographed the entrance.

During the trip from Missouri to Kansas, according to the testimony, appellant told Bobbie Lynn Eicholz that when they arrived in Kansas they would make a movie in

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1. This section provides:

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

which they, appellant and Eicholz, would engage in various sexual acts and that she would be paid.

After the arrival in Kansas they did engage in the mentioned acts, all of which were filmed. After the conclusion of the filming appellant returned Eicholz to her home in Missouri and paid her a sum of money which was to compensate her for her activities. She received none of the proceeds from the subsequent sale of the film.

Later there were arrangements made with Eicholz for her to travel to Hawaii for the purpose of making additional movies, and subsequently appellant and Eicholz did travel separately to Hawaii in early January 1971, where they made another movie of the same nature. She was paid for this as well.

Eicholz was convicted of conspiracy to violate the Mann Act in a separate proceeding.

There was testimony which corroborated that of Eicholz as to what occurred during the making of the movie. Other persons were invited to attend and several of these spectators paid a sum of money to watch the production of the film.

In appellant's testimony he admitted making the movie and performing the acts therein, but denied that he transported Eicholz from Missouri to Kansas, maintaining that he picked her up at her mother's home in Kansas. This latter fact was, however, refuted by Eicholz' mother.

The basic argument of appellant is that since the purpose of the transportation was to make a movie and not to promote the white slave business or was not directed at immorality, the Mann Act was not violated. The ultimate question is whether the fact that a movie was made and that payment was at least in part for this activity de-

tracts from the fact that sexual acts were performed and that money was paid incident to the acts.

In its instructions to the jury the court charged that the term "other immoral purposes" contained in the indictment had no broader meaning than the term "prostitution."

I.

We are of the opinion that the making of the movie does not serve to purge the transaction of its Mann Act character. It is true that the majority of Mann Act prosecutions involve what might be characterized as commercial vice. They are concerned with the most commonly thought of form of prostitution which is engaging in sexual acts for pay with more than one man. United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971); United States v. Kennedy, 442 F.2d 444 (10th Cir. 1971). It is also true that there is no case exactly like the present one, but from this it does not follow that it escapes the thrust of the statute, for there have been variations from the accepted types of violations.

Defendant claims that the Mann Act's definition of prostitution which governs does not contemplate a single series of acts of intercourse; that it contemplates instead widespread traffic and prostitution including the exploitation of the woman; that a single transaction does not suffice. The Supreme Court has rejected this argument in Caminetti v. United States, 242 U.S. 470 (1917) and Cleveland v. United States, 329 U.S. at 17 fn.3.

Thus convictions have been upheld where defendant had relations with an individual woman without pay. Caminetti v. United States, *supra;* United States v. Reginelli, 133 F.2d 595 (3d Cir.), *cert. denied*, 318 U.S. 783, *re-*

hearing denied, 319 U.S. 780 (1943); De Vault v. United States, 388 F.2d 179 (10th Cir. 1964).[2]

The often cited case of the Supreme Court which provides a definition of prostitution is Cleveland v. United States, *supra*. The opinion in that case contains the definition "the offering of the body to indiscriminate lewdness for hire. . . ." or as "sexual relations for hire." *Id.* at 17.

The Fifth Circuit in United States v. Sapperstein, 312 F.2d 694 (5th Cir. 1963), considered a case in which the women were transported for the purpose of performing in a nightclub. The Mann Act was held to be violated because their duties included engaging in acts of prostitution with the patrons. Along this same line the Seventh Circuit has held that where the transportation was for the performance of a strip tease act at a so-called stag party and where the sexual acts grew out of this and were not incident to the transaction, there was not a violation of the Mann Act. *See* United States v. Prater, 518 F.2d 817 (7th Cir. 1975). The indications from the court's opinion were that if the employment had been for sexual activity the result would have been just the opposite.

A further argument of defendant is based on Mortensen v. United States, 322 U.S. 369 (1944), in which the Supreme Court reversed the Mann Act convictions of defendants, operators of a house of prostitution in Nebraska, who took two of the girls living in the house as prostitutes

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2. In United States v. McClung, 187 F. Supp. 254 (D.C. La. 1960), the court held that a single act of intercourse between defendant and a willing woman (there is nothing in our case to indicate that Ms. Eicholz was coerced) was not violative of the act. *McClung*, however, is distinguishable since there the woman was uncompensated and, here, Ms. Eicholz was paid for her performance. Moreover, the activities in *McClung* appeared to be wholly private; in our case the activities were commercial and public.

on a vacation trip to Utah and then returned them to the house in Nebraska. But the trip itself was entirely innocent in its purpose; the girls were not hired out for acts of prostitution en route. Prostitution was not an integral part, a cause, for the trip.

In our case the performance of the acts was absolutely essential to the production of the movie, the acts could not be divorced from the movie making. This makes it sufficient to bring appellant within the Act. Cf. Mortensen v. United States, *supra;* De Vault v. United States, *supra;* United States v. Tyler, 424 F.2d 510 (10th Cir. 1970).

II.

We must reject the further contention of appellant that since it is a film the First Amendment not only clothes it but places it beyond the reach of the Mann Act. True, movies are forms of expression entitled to First Amendment protection, Burstyn v. Wilson, 343 U.S. 495 (1952), and acting in a movie is protected as well, Schacht v. United States, 398 U.S. 58 (1970), but the First Amendment does not constitute a license to violate the law. *Cf.* Miller v. California, 413 U.S. 15 (1973).

The important point is that Congress is within its powers in prohibiting the interstate transportation of a woman for the purpose of prostitution. Of itself it is not a suppression of speech or expression. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

The judgment of the district court is affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL E. MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 526 F.2d 736.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1975. A timely petition for rehearing was denied by the court of appeals on November 26, 1975. The petition for a writ of certiorari was filed on January 8, 1976.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The petition is thus out of time under Rule 22(2) of the Rules of this Court. The court of appeals granted petitioner's motion to stay the mandate on December 9, 1975, but that order does not affect the time for filing this petition.

QUESTIONS PRESENTED

1. Whether the knowing transportation of a woman across state lines to engage in sexual intercourse for payment violates the Mann Act, when these actions occur as part of making a sexually explicit film.

2. Whether, if the Mann Act applies in these circumstances, the Act abridges petitioner's First Amendment rights.

STATUTE INVOLVED

The Mann Act, 18 U.S.C. 2421, is set out in relevant part at Pet. 3.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of transporting a woman in interstate commerce for the purposes of prostitution or debauchery or other immoral purpose, in violation of 18 U.S.C. 2421 (the Mann Act).[2] Petitioner received a suspended three-year prison term and was directed to serve four months in a community treatment center, to be followed by three years' probation. The court of appeals affirmed (Pet. App.).

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[2]Although the judgment of the district court recites that petitioner was convicted of interstate transportation for the purposes of prostitution, debauchery or other immoral purposes, the jury was instructed to consider only whether the transportation was for the purpose of prostitution and, over the objection of the government (Tr. 160-161, 230), not to consider whether the interstate transportation had been for the purpose of debauchery or other immoral purpose (Tr. 214-215; see Stip. 4).

The evidence at trial showed that on December 6, 1970, pursuant to an earlier arrangement, petitioner transported Bobbie Lynn Eicholz from Missouri to Kansas (Stip. 2).[3] During the trip, petitioner explained to Eicholz that she would be performing various sexual acts with petitioner which would be filmed, and that she would be paid for doing so (Stip. 2-3). Petitioner also told Eicholz that while in Kansas she "didn't have to" "have sex with anybody there for money," "if [she] didn't want to" (Tr. 72).[4] Eicholz testified that during the trip petitioner warned her that, if questioned, she was not to mention his name because "men could get into trouble for things like this" (Tr. 60).

In Kansas, petitioner and Eicholz engaged in various sexual acts, including sexual intercourse (Stip. 3). These acts were recorded on film (Stip. 3).[5] Several persons paid petitioner money to watch the activities (Stip. 3). One man asked petitioner if Eicholz would have intercourse with him (Tr. 65). Petitioner asked Eicholz but she refused (Tr. 65). Petitioner thereafter returned Eicholz to her home in Missouri and paid her $100 in cash in return for her activities of the day (Stip. 3; Tr. 66).

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[3]"Stip." refers to the stipulation of facts submitted to the court of appeals in connection with the appeal of this case. We are lodging a copy of the stipulation with the Clerk of the Court.

[4]"Tr." refers to the transcript of the trial (excluding *voir dire* and sentencing), a copy of which we are lodging with the Clerk of the Court. It was not before the court of appeals.

[5]The film, which is approximately 20 minutes long (Tr. 15), was introduced by the government (and viewed by the jury (Tr. 120)) to corroborate the testimony of its witnesses concerning the identity of the persons and the nature of the sexual activity in which they engaged (Tr. 11-15).

Petitioner apparently received no proceeds from subsequent sales of the film (Stip. 3). Indeed, Eicholz suggested the film was not processed for some time (Tr. 63). When it was developed, Eicholz herself sold copies of the film and retained the proceeds (Tr. 80, 93-94). Eicholz explained that in August 1971 she started a business with several other women in which they would entertain men by having a party and showing the film (Tr. 94). It was in this way that Eicholz sold copies of the film (Tr. 93-94). At least some of the men were sent to Eicholz by petitioner (Tr. 94).

For the purposes of establishing a common scheme or other circumstantial evidence of petitioner's unlawful intent (see Tr. 70, 222), the government introduced evidence that petitioner and Eicholz traveled to Hawaii a short time after the events for which petitioner was convicted in the instant case. Eicholz raised the money for her transportation to Hawaii at a party which petitioner had arranged and which was attended by a number of men (Tr. 67-68). Petitioner explained to Eicholz that in Hawaii they would engage in sexual acts which would be filmed (Stip. 3; Tr. 67-69) and that, in addition to making films, she could also make some money on the side with men (Tr. 116). In Hawaii, petitioner and Eicholz engaged in sexual intercourse, which was filmed and for which Eicholz was paid $100 (Tr. 68-69).

Eicholz testified that she had a prior conviction for conspiring to violate the Mann Act (Stip. 3), apparently in connection with incidents other than the one involved in this case (see Tr. 82).

ARGUMENT

1. Petitioner contends that his conduct did not violate the Mann Act because that statute does not

reach the making of a sexually explicit motion picture (Pet. 9). The basis upon which petitioner was convicted, however, was that he transported Eicholz in interstate commerce for purposes of prostitution—engaging in sexual intercourse for compensation. Petitioner took her from Missouri to Kansas for the express purpose of engaging in sexual intercourse with her, paid her $100 for doing so, permitted others to observe the sexual activities for money, and was aware that while there Eicholz might have paid intercourse with others. Petitioner apparently retained no interest in the film; he received none of the proceeds from its sales.

Prostitution has an element of debauchery, although the latter term in the Mann Act presumably is broader than the former. Webster's *New International Dictionary* (3d ed., 1961) defines prostitution to include "indulging in promiscuous sexual relations esp. for payment." *The Random House Dictionary of the English Language* (1966 ed.) defines prostitution as the "act or practice of engaging in sexual intercourse for money." This Court has defined "prostitution" as used in the Mann Act as referring "to women who for hire or without hire offer their bodies to indiscriminate intercourse with men." *United States* v. *Bitty*, 208 U.S. 393, 401, quoted in *Caminetti* v. *United States*, 242 U.S. 470, 486. Petitioner's transportation of Eicholz was for that purpose.

The fact that Eicholz engaged in sexual intercourse for compensation as part of the making of a film does not remove petitioner's conduct from the prohibition of the Mann Act. There is no evidence of a prior relationship between Eicholz and petitioner other than the meetings to arrange the trip (Tr. 55-57); this was simply a commercial exploitation of sexual activities for profit. Nor is there any indication that this activity related to a legitimate or serious

cinematic effort. Eicholz did not engage in the filmed sexual activity because she was an actress or had any interest in the film itself.[6] Indeed, the evidence suggests that Eicholz was a prostitute[7] who agreed to have sexual intercourse with petitioner because she needed the money (Tr. 54-56, 59, 67-68, 87, 94, 116).[8] As the jury was properly instructed (Tr. 216), prostitution need not be the only purpose of the transportation; it is enough that it was one of the dominant purposes of the journey. See, *e.g., United States* v. *Tyler,* 424 F.2d 510 (C.A. 10), certiorari denied, 400 U.S. 839; *United States* v. *Lomas,* 440 F. 2d 335 (C.A. 7), certiorari denied, 404 U.S. 842.

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[6]Eicholz testified that she did not see the film for some time and believed that it had not even been processed (Tr. 63). When she received copies of the film, the evidence suggests she used it to promote a prostitution business with men sent to her by petitioner (Tr. 94).

[7]There is no explicit evidence that Eicholz was a prostitute. But that she was is inferrable from the testimony concerning her motivation for making the film (Tr. 59), her trip to Hawaii (Tr. 68-69, 102, 116), the party prior to the trip at which she earned or raised money to pay for the trip (Tr. 67-68), her prior conviction (Tr. 54, 74, 82), and her operation of what was apparently a house of prostitution (Tr. 94). At a side bar conference (Tr. 95-101) the district judge and counsel for both sides indicated their understanding that Eicholz was a prostitute.

The character of the woman who had been transported is relevant circumstantial evidence of the purpose and nature of the interstate transportation and subsequent acts.

[8]This evidence was not impeached by testimony that Eicholz declined to have intercourse with another man who had watched her perform with petitioner (Tr. 65). To the contrary, this incident confirms that petitioner's transportation of Eicholz was for the purpose of prostitution. When the man asked petitioner whether Eicholz would have intercourse with him, petitioner referred the request to Eicholz—an act that was in accord with petitioner's statement to Eicholz that while in Kansas she was not required to "have sex with anybody there for money" "if [she] didn't want to" (Tr. 72).

2. Petitioner contends (Pet. 9) that the application of the Mann Act to his activities in this case violates his First Amendment rights as a filmmaker. The conduct for which petitioner was convicted, however, was the interstate transportation of a woman for the purpose of prostitution, not for that of making a film. There is no indication that the film in this case was anything other than routine pornography, made and distributed as such. Whatever incidental impact petitioner's conviction may have had upon his First Amendment rights does not sufficiently implicate those rights to render his conviction unconstitutional. *United States* v. *O'Brien,* 391 U.S. 367, 376-377; see also, *Schact* v. *United States,* 398 U.S. 58, 61-63;[9] *California* v. *LaRue,* 409 U.S. 109, 117-118; *Miller* v. *California,* 413 U.S. 15, 26 n. 8.

3. Contrary to petitioner's suggestion (Pet. 6, 9), this prosecution does not represent an attempt by the federal government to use the Mann Act to regulate obscenity. The government did not contend that the film was obscene; the film was shown to the jury only to prove that petitioner and Eicholz engaged in the sexual acts for which he transported her (Tr. 11-15, 127). The conviction of petitioner for violating the Mann Act in these somewhat unusual circumstances presents no question regarding the use of that statute generally to prosecute the production or distribution of obscene films.

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[9]Although the Court in *Schact* invalidated a statute prohibiting the wearing of a uniform in a theatrical or motion picture production if the actor's portrayal of a member of the Armed Forces tended to discredit the military, on the ground that the tending-to-discredit qualification violated the First Amendment, it recognized that an absolute ban on the unauthorized wearing of the uniform would be valid (398 U.S. at 61).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL E. MOORE,
Attorneys.

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